IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.738 OF 2005
IN
SUIT NO.2722 OF 1984

1. M/s.Commercial Union Assurance Company Ltd. having its registered office at St.Helen's 1 Undershaft, London BC3) 300/, and having agents in Mumbai being M/s.Tata Finlay Ltd. having office at Chartered Bank Bldg; M.G.Road, Fort, Mumbai 400 023.

2. M/s.Shipping Corpn. of India Ltd. Shipping House, 245, Madame Cama Road, Mumbai 400 021. Appellant

versus

1. M/s.AFRO ASIAN Associates, Green House, 2nd Floor, Green Street, Fort, Mumbai 400 023.

2. M/s.Champion Auto Parts, 171, London (England).

3. The Trustees of the Port at Bombay, Vijaydeep, Ballard Estate, Mumbai 400 039. Respondents

Mr.Rahul Narichania with Mr.Kunal Shah i/by M/s.Bhatt and Saldhana for appellants.

Mr.V.S.Khemka for respondents.

CORAM : DR.S.RADHAKRISHNAN AND S.C.DHARMADHIKARI, JJ.

DATE : 11th October 2005

ORAL JUDGEMENT : (PER - S.C.DHARMADHIKARI, J.) :-

1. Admit. The contesting respondent (respondent no.1 - original plaintiff) waives notice. Presence of respondents 2 and 3 is not necessary. By consent, appeal is heard forthwith.

2. This appeal impugns an order passed by the learned Single Judge on 22nd July 2005 in the above mentioned Civil Suit. The learned Judge has passed a decree as against appellants and respondent no.2. However, he has dismissed the claim as against respondent no.3 on the ground that it is barred by limitation.

3. The appellants before us are original defendants 2 and 3. The first respondent is the plaintiff whereas respondents 2 and 3 are the original defendants 1 and 4. The parties shall be referred to by their nomenclature in the suit.

4. First respondent filed a Suit in this Court claiming a decree against Appellant No.1 in the sum of Rs.2,21,049=01 Ps. along with interest. Alternatively, respondent no.1 prayed for a decree in the sum of Rs.2,50,000=00 against Appellant No.2 and respondent no.3 to the present

appeal. The second alternate relief was for a decree as against Respondent no.2 to the present appeal in the same amount. The third alternative prayer was for a money decree against all defendants.

5. The case of the plaintiff is that the first defendant firm is carrying on business as Exporter of Motor Parts and allied items. Defendant no.2 is a company registered in England and carrying on business as Insurer.. The third defendant is carrying on business as Carriers of goods by Sea. The fourth defendant to the suit is the Bombay Port Trust.

6. The case is that there was an agreement to sell and deliver to the plaintiffs certain goods. It was between plaintiff and defendant no.1. Further case of the plaintiff is that the goods were shipped and were to arrive at a designated Port in India. However, the goods/consignments was not traceable. A claim was lodged with the Insurer. However, the said claim has not been honoured and paid. The case of the plaintiff is that they as well as defendant no.3 have carried out their part of insurance policy. The second defendant Insurer was, therefore, bound and

liable to indemnify the loss suffered, in terms of the policy. The second defendant has refused to pay the amount without any justification. Alternatively fourth defendant was also liable under the statutory obligations to make good the loss caused to the plaintiffs. It is also contended that due to negligence, malfeasance, misfeasance and breach of duty, the other defendants are also liable to pay. Finally, at least the seller of the goods is liable to compensate the plaintiff for non delivery.

7. The suit is instituted on 17th August 1984. To the plaint, there are several annexures including letters wherein stand of the defendants is made known to the plaintiffs through their respective advocates.

8. The suit was placed before a learned Single Judge of this Court and he noted that as far as second respondent is concerned, none appeared despite service. As far as the present appellants are concerned, their counsel was present. Learned counsel appearing for the third respondent was also present.

9. The attention of the learned Judge was

invited to the fact that none of the defendants had filed their written statement despite a date fixed for filing of the same. According to him, no written statement is filed although considerable time has elapsed from the date of institution of suit and service of Writ of Summons. However, learned counsel appearing for the appellants contended that the written statement is declared in the year 1992 but was not placed on record of this Court. The Court proceeded on the basis that the averments in the plaint are not controverted. As far as the third respondent is concerned, the suit was dismissed by the learned Judge holding that the claim against it is time barred. A discussion in that behalf is in para 2 of the impugned order.

10. However, as far as present appellants are concerned, the learned Single Judge proceeded on the basis that in the absence of any written statement filed by them, the suit is liable to be decreed as against present appellants and respondent no.2 under Order VIII, Rule 10 of Code of Civil Procedure. Accordingly, he passed a decree in terms of prayer clause (a) as far as present appellant no.1 and awarded interest @ 9% p.a. from the date of filing of the suit till

realisation. The suit is dismissed against defendant no.4.

11. As stated above, the original defendants 2 and 3 are in appeal against this decree and order.

12. Mr.Narichania - learned counsel for the appellants submits that the learned Judge erroneously proceeds on the basis that no written statement is filed. He invites our attention to the order passed by learned Single Judge and contends that the written statement was ready but remained to be tendered on record of the Court. He invites our attention to the fact that respective written statements were declared on 23rd June 1992 and 12th June 1998. They disclose defence on merits. The learned Judge, therefore, ought not have proceeded on the basis that the suit is not defended and plaint averments are not controverted by the appellants.

13. Mr.Narichania also submits that the learned Judge was in clear error in dismissing the suit as being barred by limitation only against respondent no.3 herein. If the suit claim is barred by limitation, then the entire suit ought

to have been dismissed by him. In any event, Mr.Narichania submits that mere non filing of the written statement does not mean that the plaintiff is absolved of his responsibility in law to prove his claim. He submits that the plaintiff is obliged to prove his claim by leading evidence at the trial and even if there is no written statement the defendant can cross-examine the plaintiffs' witnesses or the plaintiff himself on the case as set out in the plaint. Admittedly, no such opportunity was granted and, therefore, order and decree rendered by learned Single Judge is liable to be quashed and set aside.

14. In support of the above submissions Mr.Narichania places heavy reliance upon provisions of Order VIII of Code of Civil Procedure and more particularly Rules 5 and 10 thereof. The same have been interpreted as directory according to Mr.Narichania, by the Hon'ble Supreme Court in the case of Modula India Vs. Kamakshya Singh Deo reported in AIR-1989-SC-162.

15. On the other hand, Mr.Khemka - learned counsel for first respondent states that no error

is committed by the learned Single Judge inasmuch as it is not the case of the appellants that the written statement which was declared was indeed filed or in any event an attempt was made to file the same. That apart, a copy thereof was also not furnished to the plaintiffs' advocate. In the absence of such a case, the Court was right in proceeding on the basis that the claim is undefended. He submits that Order VIII, Rule 10 of CPC confers discretion upon the Court to pronounce a judgement and in the present case the said discretion has been exercised judiciously. He submits that no interference is, therefore, required with the order of learned Single Judge.

16. Alternatively, he submits that if we are inclined to set aside the order under challenge and restore the suit to file, then, the appellant should be directed to secure the claim of the plaintiffs. They should be directed to either deposit some amount or furnish a bank guarantee in favour of the Prothonotary & Senior Master of this Court. In other words, by imposing appropriate conditions, the order under challenge should be set aside.

17. With the assistance of learned counsel

appearing for both sides we have perused the averments in the plaint and the order under challenge. We have perused the relevant provisions of Code of Civil Procedure and also the decision of Supreme Court referred above. Having perused the averments made in the plaint, we are satisfied that the alternate pleas set out in the plaint would amply demonstrate that the first respondent was in doubt as to whether the appellant no.2 alone or the present appellants along with respondent no.3, are liable to honour the claim. It is not as if there is an admission of the liability and therefore, a decree was being claimed on that basis from the appellants. The loss caused to the plaintiffs was liable to be made good either jointly or severally by the parties impleaded as defendants to the suit. Even in the absence of pleadings, the plaintiff was obliged to prove its case set out in the plaint.

18. The impugned judgement and order does not indicate that the learned Judge has followed the well settled principles of calling upon the plaintiff to prove his case, even in the absence of defendants, by placing requisite materials. This aspect is more relevant in this case because

without any written statement the learned Judge has dismissed the claim against third respondent holding that it is time barred. He, partially allows the suit. When such is the fact situation, the learned Judge could not have proceeded on the basis that the claim is undefended.

19. It is an undisputed fact that written statements of the appellants were declared as above and all that remained to be done was tendering the same on record. The prevalent practice of this Court appears to be that the written statements are declared and formally taken on record/filed when the suit reaches hearing. The period from the date of institution of the suit and trial is considerable in this case. Therefore, pleadings are often taken on record when the matter is set down for hearing and trial. In the interest of justice the learned Judge, therefore, ought not to have proceeded ex-parte i.e. in the absence of pleadings/written statement. The learned Judge ought to have exercised his discretion in such a manner so as not to deprive the present appellants of an opportunity to defend the claim on merits. It is not a case where no written

statement was prepared or drafted and time was sought in that behalf when the matter reached hearing. This is a case where written statement was ready and declared but remained to be tendered on record. The discretionary power conferred on the Court by the provisions ought to be exercised in consonance with the settled principles of equity, justice and good conscience. The Court is not obliged to pronounce a judgement straightway but make other order as it deems fit. We need not go into these aspects in further details. However, it is necessary to reproduce the observations of Supreme Court in the case of Balraj Taneja Vs. Sunil Madan reported in AIR-1999-SC-3381 and also in case of Modula India Vs. Kamakshya Singh Deo reported in AIR-1989-SC-162, relevant observations are thus:-

> **"Balraj Taneja Vs. Sunil Madan (AIR-1999-SC-3381) :-**
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> "14. This Rule, namely Rule 10, was also amended by the Code of Civil Procedure (Amendment) Act, 1976 (Act No.104 of 1976). Prior to its amendment, it was held in a number of decisions that the rule can be invoked only in those situations where the Court has required the defendant to file the written statement in terms of Rule 9 of Order 8. A few other High Courts had taken the view that this Rule would be applicable even to those cases where a written

statement was required to be filed under Order 8, Rule 1, CPC. The conflict of decisions has been set at rest by providing specifically under this Rule that where a party from whom a written statement is required either under Rule 1 or Rule 9 of Order 8 fails to present the same within the time permitted or fixed by the Court, the Court shall pronounce judgement against him or make such order in relation to the suit as it thinks fit. Rule 10 thus governs both the situations where a written statement is required under Rule 1 of Order 8 as also where it has been demanded under Rule 9. In both the situations, if the written statement has not been filed by the defendant, it will be open to the Court to pronounce judgement against him or make such order in relation to the suit as it thinks fit. It is to be noticed that if the written statement is not filed, the Court is required to pronounce judgement against the defendant. The words "against him" are to be found in Rule 10 of Order 9 which obviously means that the judgement will be pronounced against the defendant. This rule also gives a discretion either to pronounce judgement against the defendant or "make such order in relation to the suit as it thinks fit." These words are of immense significance, inasmuch as they give a discretion to the Court not to pronounce judgement against the defendant and instead pass such order as it may think fit in relation to the suit."

"29. As pointed out earlier, the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor the Court should proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court. In a case, specially where a written statement has not been filed by the defendant, the Court should be a little cautious in proceeding under Order 8, Rule 10, CPC. Before passing the judgment against the defendant it must see to it that even if the facts set out in the plaint are

treated to have been admitted, a judgment could possibly be passed in favour of the plaintiff without requiring him to prove any fact mentioned in the plaint. It is a matter of Court's satisfaction and, therefore, only on being satisfied that there is no fact which need be proved on account of deemed admission, the Court can conveniently pass a judgment against the defendant who has not filed the written statement. But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the plaint itself, it would not be safe for the Court to pass a judgement without requiring the plaintiff to prove the facts so as to settle the factual controversy. Such a case would be covered by the expression "the Court may, in its discretion, require any such fact to be proved" used in sub-rule (2) of Rule 5 of Order 8, or the expression "may make such order in relation to the suit as it thinks fit" used in Rule 10 of Order 8."

"Modula India Vs. Kamakshya Singh Deo (AIR-1989-SC-162) :-

"... ... ... An objection to our above conclusion has been raised on the basis of the provisions of Order VIII of the Code of Civil Procedure. Rules 1, 5 and 10 of this Order have been recently amended by the Amendment Act of 1976. We find nothing in these rules which will support the contention urged on behalf of the respondents. Rule 1 merely requires that the defendant should present a written statement of his defence within the time permitted by the Court. Under Rule 5(2), where the defendant has not filed a pleading it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint except against a person under disability but the Court may in its discretion require any such fact to be proved. Again under Rule 10 when any party from whom a written statement is required fails to present the same within the time permitted or fixed by the Court, the Court "shall pronounce judgment

against him or make such order in relation to the suit as it thinks fit." It will be seen that these rules are only permissive in nature. They enable the Court in an appropriate case to pronounce a decree straightway on the basis of the plaint and the averments contained therein. Though the present language of Rule 10 says that the Court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the defendant or to make such other appropriate order as the Court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the plaintiff straightway because a written statement has not been filed. Reference was made before us to sub-rule (1) of Rule 5. This sub rule, however, has application only in a case where a pleading is filed but does not contain a specific or implicit denial of the averments contained in the plaint or other document to which it is a reply. Rule 5(1) cannot be made use of to sustain the contention that where there is no written statement the Court is bound to accept the statements contained in the plaint and pass a decree straightway. These provisions of the Code of Civil Procedure, far from supporting the contentions of the plaintiff that a decree on the basis of the plaint should follow a failure to file the written statement, rather indicate a contrary position, namely, that even in such cases, it is a matter for the Court to exercise a discretion as to the manner in which the further proceedings should take place. We, therefore, do not think that the terms of Order VIII in any way conflict with the conclusion reached by us."

20. Applying these settled principles to the facts and circumstances of the present case, we

are of the view that the learned Judge was in clear error in decreeing the suit as far as appellants are concerned. The order passed by the learned Judge decreeing the suit as far as appellants before us are concerned, is therefore, liable to be interfered with and is hereby quashed and set aside. Rest of the order is not interfered with. As a consequence, the suit is restored to the file as far as present appellants are concerned and the same shall be disposed of on merits and in accordance with law. Needless to state that the written statement of the present appellants is taken on record and the learned Single Judge should proceed to dispose of the suit after framing necessary issues and in accordance with law. However, there shall be no order as to costs.

21. In the view we have taken, it is not necessary to advert to the decision of Supreme Court reported in (2002)3-SCC-159 (V.K.Industries and others Vs. M.P.Electricity Board, Rampur, Jabalpur) brought to our notice by Mr.Khemka. The said decision is rendered in the context of an application to set aside an ex-parte decree invoking Order IX, Rule 13 of CPC.. All that is urged is that the terms upon which the ex-parte

decree was set aside are onerous and not reasonable. Far from assisting Mr.Khemka, the observations of Supreme Court in this case would demonstrate that even while ex-parte decrees are set aside, the Court must impose such conditions as are reasonable after having regard to all relevant factors. This decision can have no application to the controversy before us.

22. Appeal stands allowed in terms above.

(DR.S.RADHAKRISHNAN, J.)

(S.C.DHARMADHIKARI, J.)